

Always Keep a Hold of Nurse

Lee, Robert

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Always Keep a-hold of Nurse: British Environmental Law and Exit from the European Union

Robert G. Lee^{*}

Introduction

John Gummer, when Secretary of State for the Environment in the mid-1990s, famously remarked that, at that point, 80 percent of UK environmental legislation derived from obligations under European Union (EU) law.¹ Unsurprisingly, therefore, the referendum in June 2016, in which 52 percent of votes were cast in favour of the United Kingdom (UK) quitting the EU, and the subsequent decision² of the UK Government to trigger Article 50 of the Treaty of the EU (TEU) have caused concern about what this means for the future of environmental law in the UK. This analysis begins with a critical review of the contribution of the EU to the development of UK environmental law and cautions against too great a nostalgia as we leave the EU. It places the Brexit vote in a wider political context and suggests that Brexit opens up opportunity for change. It then explores how the form of Brexit may shape environmental law going forward and it points to the significant workload that lies ahead in converting the EU environmental acquis into purely domestic law within the UK. The sheer size and legal complexity of this task might limit, in a practical sense, opportunities for change. The analysis concludes by reviewing the future shape of environmental law across the UK, particularly as it could fragment between devolved governments, once the harmonising force and governance structures of EU environmental law disappear.

On this analysis, EU environmental law begins to look a little like ‘Nurse’, in Hilaire Belloc’s cautionary tale about Jim.³ Nurse was a strict disciplinarian but worth keeping hold of for fear of finding something worse (in Jim’s case a hungry lion). Nonetheless, having slipped the hand of Nurse, and the discipline she brought, we do seem to be heading inevitably towards a more distinctive body of UK environmental law than a simple copy over of its EU equivalent, for reasons explained in this analysis piece. The question remains whether this new body of UK environmental law will indeed constitute ‘something worse’.

^{*} Birmingham Law School, University of Birmingham (r.g.lee@bham.ac.uk).

¹ Cited by John McCormick, ‘Environmental Policy in Britain’ in Uday Desai (ed), *Environmental Politics and Policy in Industrialized Countries* (MIT Press 2002) 13. For a similar figure recently, see House of Commons Environmental Audit Committee, *The Future of the Natural Environment After the EU Referendum* (Sixth Report of Session 2016-2017).

² Unlike the referendum on the electoral system in 2011 under the Parliamentary Voting System and Communities Act 2011, the EU Referendum Act 2015 laid down no requirement to follow the result, arguably meaning that the vote on Brexit is merely advisory.

³ Hilaire Belloc, *Cautionary Tales for Children* (Eveleigh Nash 1907).

The EU, the UK and the Environment

Liz Fisher and James Harrison recently argued, reflecting on Brexit, that ‘narratives matter because they shape how we see the world and the questions we ask about it.’⁴ There is a danger that, in the aftermath of British exit from the EU (commonly captured by the portmanteau ‘Brexit’), we might begin to construct a nostalgic narrative that does not quite match the reality of progress of the environmental agenda in Europe. Nostalgia may prove unhelpful in moving forward with the task of ordering environmental law in Britain post-Brexit. In particular, there may be a tendency to think of EU environmental law as an ideal body of law for environmental protection, when in reality EU environmental law has been driven at least as much by an economic as by an environmentalist agenda.

According to a recent Communication from the European Commission, the effective implementation of a body of EU environmental law ‘creates a level playing field for economic actors operating in the internal market.’⁵ Much of the EU environmental acquis was shaped following the drive for the single market under the Single European Act of 1987, which introduced a new Environment Title and more formal legislative competence on environmental matters. Recognising the market-based origin of much EU environmental regulation is not to deny the underpinning benefits of integration of EU environmental policy, particularly in the face of transboundary, diffuse, or global environmental impacts. However, much of the force behind environmental policy, not least for Member States, was support for common standards in a functioning single market in which goods and services are traded freely. This includes not just product composition or impact standards but also nationally based environmental standards which, if set too low (or indeed too high)⁶, might produce market fragmentation or trade barriers.⁷

This market-orientated basis for much of EU environmental law partly explains certain EU environmental predilections. It helps rationalise why EU environmental law has concerned itself with elaborate definitions of wastes, which it needs to differentiate waste materials from goods, since the latter should cross borders freely whereas the former,

⁴ Liz Fisher and James Harrison, *Beyond the Binary: Brexit, Environmental Law, and an Interconnected World*, OUP Blog (19 September 2016), <http://blog.oup.com/2016/09/binary-brexit-environmental-law/> accessed 3 February 2017.

⁵ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Delivering The Benefits of EU Environmental Policies Through a Regular Environmental Implementation Review* COM (2016) 0316 final, 7.

⁶ Case 302/86 *Commission of the European Union v Kingdom of Denmark* [1988] ECR I-4607.

⁷ Institute for European Environmental Policy, *Report of the Influence of EU Policies on the Environment* (IEEP 2013) 3.

under the proximity principle⁸, most certainly should not. It also explains the presence of many EU environmental targets, such as for diversification away from landfill or for renewables in the energy mix. This is because, to the extent that landfilling of waste represents a low cost management option, or renewables a higher cost energy base than hydrocarbon based energy, it assists a competitive market if the pace of regulated change is approximated across Member States. Such outcomes may serve desirable ends, such as the utilisation of secondary materials or the reduction in greenhouse gas emissions. Nonetheless, these environmental goals may be hindered by the complexities attaching to harmonisation, as exemplified by the 'one size fits all' waste definition, which has been said to hinder rather than promote re-cycling.⁹

Thus, even if certain desirable environmental ends are reached, EU environmental law remains driven by the economic liberalisation philosophy that underpins the single market. Shortly after the Single European Act, the Cecchini Report¹⁰ forecast that the completed market would increase European GDP by 4.5 to 6.5 percent.¹¹ More recently, the Europe 2020 strategy set targets of 20 per cent, in each case, for greenhouse gas reductions, energy efficiency gains and renewables in the energy mix, but the strategy has the key priority of delivering growth, whether it is labelled (as it is) 'smart, sustainable or inclusive'.¹² This carbon economy approach is indicative of environmental reductionism, in setting aside other wider¹³ considerations of environmental degradation, and implying that environmental issues are largely explicable by reference to decarbonisation. In line with the strong EU commitment to ecological modernisation,¹⁴ the 2020 Strategy suggests that the shift to renewables has the win/win 'potential to create more than 600 000 jobs in the EU' with the integration of the European energy market adding an extra 0.6 percent to 0.8 percent to gross domestic product (GDP).

The political economy of EU environmental law suggests that there are policy drivers beyond environmental protection. This is particularly because the much sought-after increase in GDP is largely a measure of consumption. This is not necessarily sustainable consumption since non-market activity, such as caring within a family setting or volunteering, goes unmeasured while well-being, social capital or qualitative measure of life

⁸ Case C-2/90 *Commission of the European Union v Kingdom of Belgium* [1993] CMLR 365.

⁹ *OSS Group v Environment Agency* [2007] EWCA Civ 611; Eloise Scotford, 'Trash or Treasure, Policy Tensions in EU Waste Legislation' (2007) 19 JEL 367; Robert Lee and Elen Stokes, 'Rehabilitating the Definition of Waste; Is it Fully Recovered?' (2008) 8 YEEL 162.

¹⁰ European Commission, *Europe 1992: The Overall Challenge*, SEC (1988) 524 final.

¹¹ A rate of growth that was not achieved although a more modest rate of two or three percent was reached: Harald Badinger and Fritz Breuss, 'Country Size and the Gains from Trade Bloc Enlargement: An Empirical Assessment for the European Community' (2006) 14 Review of International Economics 615.

¹² Communication From The Commission, *Europe 2020 A Strategy for Smart, Sustainable and Inclusive Growth*, COM (2010) 2020 final.

¹³ Alex Warleigh-Lack, 'Greening the European Union for Legitimacy? A Cautionary Reading of Europe 2020' (2010) 23 European J of Social Science Research, 297.

¹⁴ Susan Baker, 'Sustainable Development as Symbolic Commitment: Declaratory Politics and the Seductive Appeal of Ecological Modernisation in the European Union?' (2007) 16 Env Politics 297.

and environment may be poorly represented. Rising GDP might indicate over-consumption, waste of scarce resources and environmental degradation. Sustainable development seeks to re-balance the equation, but, tellingly, the EU has long preferred to make sustainable *growth* a key policy reference point, notwithstanding its wider agenda of sustainable development.¹⁵ The EU's preoccupation with sustainable growth has seemingly denied any point at which growth can be restricted by the capacity of ecosystems or the finite nature of natural resources.¹⁶ Pursuing growth implies a top-down managed European economy as reflected in the economic reform strategies of 2000 and 2010,¹⁷ whereas it has long been argued that sustainable development must take account of and include bottom-up, grassroots participation, said to be 'crucial'¹⁸ to secure co-operation and ensure the effective management of locally based resources. That it took over 20 years of campaigning against the centralised regulation of GMOs in Europe to secure an acceptance that Member States or regions with States could adopt opt out measures restricting or prohibiting the cultivation of GM crops¹⁹ provides a clear indication of how difficult it is for that grassroots voice to make itself heard.

Abandoning Business as Usual

This subjugation of grassroots voices within an economically liberal EU political framework is not only relevant background to EU environmental law but it also directly relates to motivations for the British referendum on EU membership and, since then, the recent political direction of the US with the election of Donald Trump as President. The outcome of both of these ballots came as a surprise, perhaps for the following reasons. Economic liberalisation and the push for growth have delivered wealth creation, but the sharing of that wealth is increasingly uneven in its distribution both between and within countries. If one sets a poverty threshold of 60 percent of national median income, then over 17 percent of the UK population live below the poverty level, higher than the 16.4 average figure for

¹⁵ See eg the Lisbon Strategy, 'Presidency Conclusions to Lisbon European Council' (23-24 March 2000), which expressed the ambition to become the most 'dynamic knowledge-based economy in the world, capable of sustainable economic growth' as the strategic goal for the next decade, available at: http://www.europarl.europa.eu/summits/lis1_en.htm (accessed 3 February 2017). Cf the more wide-ranging EU Sustainable Development Strategy (Communication from the Commission, *A Sustainable Europe for a Better World: A European Union Strategy for Sustainable Development* COM (2001) 264 final, as reviewed and updated), but note Lee's concern that the EU's sustainable development policy agenda is vulnerable to political and economic vicissitudes, particularly in light of the Europe 2020 Strategy: Maria Lee, *EU Environmental Law, Governance and Decision-Making* (2nd edn, Hart 2014) 64.

¹⁶ Tim Jackson, *Prosperity without Growth: Economics for a Finite Planet* (Routledge 2012).

¹⁷ See the Lisbon Strategy (n 15) and the 2010 Strategy (n 12).

¹⁸ Susan Baker and others, 'Introduction: The Theory and Practice of Sustainable Development in EU perspective' in Susan Baker and others (eds), *The Politics of Sustainable Development: Theory, Policy, and Practice within the European Union* (Routledge 1997) 22.

¹⁹ Directive (EU) 2015/412 of the European Parliament and of the Council of 11 March 2015 amending Directive 2001/18/EC as regards the possibility for the Member States to restrict or prohibit the cultivation of genetically modified organisms (GMOs) in their territory [2015] OJ L68/1.

the EU which has 80 million people in poverty on this measure.²⁰ In the EU context, the movement of labour in search of poverty alleviation itself became an issue around which protestors could rally in a notorious anti-immigration push for Brexit. Notably protest voters on both sides of the Atlantic were not confined to the marginalised poor or even to blue collar workers. In both the UK and the US, loss of job security in a zero hours labour market, shrinking pensions, stagnant wages, and rising housing costs, fed a wider discontent with a system that had failed to deliver on its promise of enduring possibilities of consumption. With rallying cries respectively of 'take back control and restore sovereignty'²¹ and 'drain the swamp and make the USA great again',²² both historic political votes were for change and instinctively against business as usual.

This might herald the early signs of a crisis in neo-liberalism. However, one needs to be careful in not reducing evolutionary, complex and contested societal shifts to neat, distinct phases of development. In general terms, the shift from a post-war economy based on Fordism and a commitment to a welfare state to a post-Fordist and liberalised model is discernible from around the time of the first referendum of the EU in 1975, after which the backlash at public expenditure cuts produced the winter of discontent in 1978, prior to the 1979 election and the beginnings of Thatcherism. Might it be possible some forty years later that recent political events are indicative of a change of mood and direction? The Brexit vote and the Trump disavowal of the Asia Pacific trade deal suggest more isolationist stances which inherently question the rule of the global market as a continuing, dominant political force. Might the current fluidity signal opportunity if the rejection of economic liberalisation were to open a political vacuum? If so, could one imagine that different value sets may come to the fore, including those which stress that development should proceed sustainably, in a manner respectful of natural resource limitations and the needs of future generations? In the inevitable re-writing of UK environmental law, post-Brexit, might we look to re-purpose, rather than merely copy over, pre-existing EU environmental law?

One problem with such an optimistic analysis is the simple experience of the Brexit vote and, indeed, the Trump election. The 'leave' camp in the Brexit debate show no wish to abandon economic liberalisation or to embrace sustainability. A recurrent theme of the debate both before and after the referendum has been the need to leave the EU and to leave behind its excessive regulation that so hinders the UK economy. This comes particularly from the ruling Conservative party that railed against British gold plating of EU environmental law, even though persistent searches for evidence of it proved highly

²⁰ Statistics available at <<http://www.inequalitywatch.eu/spip.php?article99&lang=en>> accessed 3 February 2017.

²¹ Boris Johnson, quoted by Reuters in *Business Insider* (1 December 2016) available at: <http://www.businessinsider.com/r-britains-johnson-says-brexit-means-taking-back-control-of-immigration-2016-12?IR=T> accessed 3 February 2017.

²² Donald Trump, quoted in Ted Widmer, 'Draining the Swamp' *New Yorker* (19 January 2017).

elusive.²³ Since Brexit, the incoming Theresa May UK Government has talked of little else than which trade ‘club’ it should join next. The only liberalisation that it seems keen to abandon is the free movement of persons, no matter how strongly the EU emphasises that this is not separable from other market freedoms. This sounds an isolationist tone similar to that of the US administration, which is likely to serve poorly any international cooperation on the environment at a time when it is needed more than ever.²⁴

Post-Brexit Possibilities

In terms of the future of UK environmental law, the institutional form that Brexit takes – that is, the nature of the new relationship agreed between the UK and the EU post-Brexit – will be critical. In particular, the structure of the post-Brexit UK-EU relationship will dictate whether and the extent to which the UK must continue taking account of EU environmental law.

One option for the UK-EU relationship post-Brexit is continuing participation in the single market, via the Agreement on a European Economic Area (EEA) in the manner of Iceland, Norway and Lichenstein. This option might imply very little change. It has been suggested that the vast majority of EU environmental law would continue to apply with the exception of the Habitats and Wild Birds Directives and those environmental issues arising out of agricultural or fisheries policy.²⁵ However, while it is true that Norway managed to agree that EU habitats protection should not apply as a condition of EEA membership, there could be no guarantee that the EU would not seek through negotiation to preserve the integrity of the network of breeding and resting sites based upon the Natura 2000 programme. In relation to fisheries, the House of Lords has suggested that negotiations on withdrawal from the common fisheries policy will be shaped by agreement over commercial fish stocks in waters that are shared between the UK and other EU coastal states, which itself will be influenced by the need of the British fishing industry to continue to its access to major European markets.²⁶ It follows that continuing single market access via the EEA might herald little change indeed in the environmental sphere.

²³ See eg HM Government, *Report of the Habitats and Wild Birds Directives: Implementation Review* (Defra, 2012) and the foreword by the Secretary of State, which once again asserts the compatibility of nature protection and economic growth.

²⁴ Duncan French, ‘Alternative Realities: Brexit and Pokémon’, *Journal of Environmental Law Blog* (10 October 2016), available at: <http://blog.oup.com/2016/10/brexit-pokemon-go-law/> accessed 3 February 2017.

²⁵ Institute of European Environmental Policy, *The Potential Policy and Environmental Consequences for the UK of a Departure from the EU* (IEEP, March 2016).

²⁶ House of Lords European Union Committee, *Brexit: Fisheries* (Eighth Report, Session 2016-17); Bryce Stewart, ‘Fisheries Policy’ in Charlotte Burns, Andy Jordan and Viviane Gravey (eds), *The EU Referendum and the UK Environment: An Expert Review* (2016) 46–56, available at: <http://environmenteuref.blogspot.co.uk/> (accessed 3 February 2017).

It seems, however, that this form of 'soft' Brexit – where there remains a legally interconnected framework for EU-UK relations – is highly unlikely on both sides of the political fence. On the European side, the EU is unlikely to be prepared to restrict free movement of persons, which freedom is allowed in the EEA agreement. On the UK side, a soft Brexit, with continued UK contributions to the EU budget and acceptance of much single market-related EU legislation, has little appeal to those who drove the successful 'Leave' campaign. A Swiss solution may have more appeal. Switzerland is a founding member of European Free Trading Area (EFTA) but neither a member of the EU or the EEA nor subject to the jurisdiction of the EFTA Court. Rather, it negotiates single market access through a series of bilateral treaties. British desires to pick and mix its European benefits and obligations might be fulfilled by this model whereby it could retain (say) access to financial services markets while abandoning the burden of environmental commitments. However, following a referendum vote in Switzerland in 2014 to cap immigration from the EU, and the Swiss decision to withdraw its longstanding, though long suspended, application to join the EU, the European Commission has made it steadfastly clear that the bilateral agreement on free movement of persons cannot be diluted without jeopardising EU market access available under other agreements. The EU has also shown considerable impatience with the need to continually update the many bilateral agreements with Switzerland to ensure adherence to the *acquis communautaire*.²⁷

This state of affairs suggests the likelihood of a 'hard' form of Brexit, in which Britain leaves the EU with no formally recast legal relationship in the absence of any transitional arrangements. Britain could then attempt to negotiate bilateral trade agreements both with the EU and with other countries, and, in the interim, it might continue to trade under WTO rules. In these scenarios, the prospects for environmental law are troubling. Although bilateral trade agreements are likely to contain provisions on the environment, which might forbid the lowering of environmental standards in order to gain competitive advantage, an early UK bilateral deal with the present US administration might not set any exacting standard, particularly in relation to climate change regulation. This would not be true, however, of any bilateral agreement with the EU, which might understandably insist on the retention of the level environmental playing field that is already in place. Other countries such as India or China may well come to the table with particular demands that might impact on the environment, not least demands to end agricultural subsidy within the UK. Meanwhile, if the UK's trading relationships are conducted under WTO rules, it has long been observed that, in a series of dispute resolutions, there has been a tendency to interpret these so as to give primacy to trade over environment.²⁸ Whilst dispute settlement

²⁷ For a review, see Sabine Jenni, 'Is the Swiss Model a Brexit Solution?' on the UK in a Changing Europe website, available at: <http://ukandeu.ac.uk/is-the-swiss-model-a-brex-it-solution/> accessed 3 February 2017.

²⁸ Fiona MacMillan, *WTO and the Environment* (Sweet & Maxwell 2001).

within the WTO framework has shown greater consciousness of environmental protection over time, the WTO itself has done little to promote environmental standards.²⁹

Practicalities of the Great Repeal Bill

Theresa May spoke at the Conservative Party conference in October 2016 of a Great Repeal Bill paving the way for much of what comes next.³⁰ The Prime Minister indicated that the government's initial ambition with such a bill was to retain all existing EU law. We might thus replace the word 'repeal' in the title of the bill with the word 'savings'. Any such bill would have to preserve large swathes of environmental law pending more considered approaches in the light of the Brexit options set out above. Colin Reid³¹ has pointed to the gargantuan task entailed in shifting through all UK environmental law to determine what to retain, what to junk or what to amend in the two year period after Article 50 notice is served, and has convincingly argued that a simple saving of all EU environmental law is not an option. Several things get in the way of this deceptively simple technical suggestion. For one thing, simple savings provisions may render inoperable large parts of environmental law, where it refers to or rests upon institutional structures, enforcement mechanisms and the substantive environmental law of the EU, which by that stage we will have left. The usual mechanism in savings provisions of transferring functions previously exercisable by one public body to another becomes difficult when the first body is the European Commission, whose very function in domestic law we have chosen to reject and where it is difficult immediately to think of a body that we would trust in its place.

This is indicative of a governance gap going forward as we lose what Maria Lee has described³² as the 'routinely' operating framework of Member States planning, reporting and explaining to the Commission and the Council their progress in implementing the requirements of environmental law. The previous UK Coalition Government, at a very early stage, swept away those few UK bodies, such as the Sustainable Development Commission or the Royal Commission on Environmental Pollution, which might have brought some domestic accountability in place of EU institutions. However, this history may provide useful infrastructure on which to build. Similarly, it has been pointed out³³ that there are questions of interpretation of those retained elements of EU environmental law going forward. However such questions may be resolved, the imperative, in section 3(1) of the European

²⁹ Eric Neumayer 'The WTO and the Environment: Its Past Record is Better than Critics Believe, but the Future Outlook is Bleak' (2004) 4 Global Env Politics 1.

³⁰ Prime Minister Theresa May speech, 'The Good that Government Can Do', Conservative Party conference, Birmingham, 2 October 2016.

³¹ Colin Reid, 'Brexit and the Future of UK Environmental Law' (2016) 34 J of Energy and National Resources L 407.

³² Maria Lee, 'Brexit: Environmental Accountability and EU Governance', *OUP Blog* (17 October 2016), <<http://blog.oup.com/2016/10/brexit-environment-eu-governance/>> (accessed 3 February 2017).

³³ Eloise Scotford and Megan Bowman, 'Brexit and Environmental Law: Challenges and Opportunities' (2016) 27 King's LJ 416.

Communities Act 1972, for UK courts to give effect to decisions of the Court of Justice of the European Union will have gone, so that it is possible to foresee a divergent jurisprudence between the UK and the EU on law which once had a common origin.

Beyond 'saving' existing EU law that has been transposed into UK law, there will be new tasks of law-making where we have relied on directly applicable regulations of the EU. This could form an enormous workload where, by way of example, we need to re-order chemicals regulation, wanting continued access of UK chemicals to the EU market but devoid of the structures operated by the European Chemicals Agency. In looking for new and consistent regulatory arrangements in such a case, it should be kept in mind that soft law provisions may drive regulatory frameworks just as much as those written into hard law.³⁴ It may also be necessary to make new law to meet our obligations under international environmental law, where such obligations have previously been written into EU environmental law. This may cause certain parts of EU environmental law to be retained but these choices may be difficult where international obligations are scattered across a number of Directives, as with the second pillar of the Aarhus Convention,³⁵ where Aarhus-compliant public participation provisions are found in EU law in Directives on pollution control and also on environmental impact assessment.³⁶ Decisions may also need to be made about whether to retain targets (such as those for recycling or renewables considered above) written into EU environmental law.

Environmental Legislation and Devolved Government

To further complicate matters, such law-making choices will be exercised across the governments of the UK, for legislative competence on the environment is widely devolved, making it difficult for Whitehall to bring a UK-wide perspective within any savings provision. Practicalities suggest that saving EU environmental law in its entirety may be the only sensible option, freeing the devolved administrations to determine their own course of future law-making to address the legislative and governance complexities rehearsed above. In the recent *Miller* litigation on triggering Article 50 TEU, the Supreme Court considered the status of statutory assurances that the UK Government 'will not normally legislate' with regard to devolved matters without the consent of the devolved governments.³⁷ It found these provisions to be non-justiciable on the basis that the purpose of such legislation was to do no more than entrench a constitutional convention and, while courts might observe

³⁴ Steven Vaughan, *EU Chemicals Regulation: New Governance, Hybridity and REACH* (Edward Elgar 2015).

³⁵ UNECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (adopted 25 June 1998, ratified 30 October 2001) art 6.

³⁶ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L334/17, art 24; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1 (as amended), art 6.

³⁷ See eg s 28(8) Scotland Act, as inserted by s 2 Scotland Act 2016.

conventions, they cannot give rulings on their operation or scope.³⁸ Leaving aside, for now, whether this represents what the citizens of the devolved jurisdictions understood by, or hoped for, in this legislation, Jennings has suggested that conventions are sustained because the consequences for violating them would be ‘political difficulties’ for those involved.³⁹ Given the ‘remain’ majority in the Scottish vote in the EU referendum, it is not too great a claim to suggest that the political difficulties inherent in seeking to determine, on behalf of Scotland, which parts of the environmental *acquis* should be retained or rejected might well lead to the disintegration of the United Kingdom.

This suggests not just a different path for UK environmental law but several pathways, given the ‘remain’ votes in Scotland and Northern Ireland and the very different degrees of enthusiasm for Brexit across the UK governments. The variant pathways are already being laid down. We can see this by examining the progress made in Scotland under Part 3 of the Regulatory Reform (Scotland) Act 2014 in reshaping Scots environmental law or the repurposing of Welsh environmental law along lines of sustainable natural resource management.⁴⁰ Wales recently announced an ambition to pursue a major programme to codify and publish a distinct body of Welsh law as it restates its law post-Brexit⁴¹ along the lines suggested by the Law Commission.⁴² One function of EU law was to produce a broadly harmonised UK environmental law but, with that discipline withdrawn, and given the different political complexions and ambitions of the devolved administrations, we may have to learn to live with a fragmented body of UK environmental law. Out of this may come exciting new approaches and exchange of ideas; on the other hand, there are real questions concerning the operability of divergent systems within the UK. Bear in mind that what could be lost, post-Brexit, are foundational principles written into the EU Treaties and much of the accountability and governance frameworks brought by the EU. Might we face a future where, for example, both strong and weak models of (say) the precautionary principle operate in the UK and are policed within very different institutional frameworks?

Conclusion

This analysis suggests that, for all of its contribution to UK environmental law, the EU has shaped that law in ways that fundamentally supported market freedoms in pursuit of economic growth. Brexit offers the UK an opportunity to examine the shortfalls of that

³⁸ *R (on the application of Miller v Secretary of State for Exiting the European Union)* [2017] UKSC 5, [149] and [146] respectively.

³⁹ Ivor Jennings, *The Law and the Constitution* (5th ed, University of London Press 1959) 134.

⁴⁰ Environment (Wales) Act 2016, s 3.

⁴¹ Newsdesk, ‘Welsh Government Plans National Legal Code’ *Law Society Gazette* (13 December 2016), available at: <https://www.lawgazette.co.uk/law/welsh-government-plans-national-legal-code/5059142.article> (accessed 3 February 2017).

⁴² Law Commission, *The Form and Accessibility of the Law Applicable in Wales* (Law Com no 366, 2016), and see Scotford and Bowman (n 33), who argue the necessity and urgency of this task for the UK as a whole.

approach and to re-assert a more sustainable route for environmental law. Regrettably, this is an opportunity that may not be realised as, notwithstanding the discontents with globalisation,⁴³ the underpinning socio-economic policies of the UK Government may remain, even as Britain leaves. However, the commitment to and ambitions for environmental law may be very different within the devolved governments of the UK. Britain may find itself facing a herculean task in re-ordering its environmental law in a situation in which there is no simple route to the retention of the status quo. Devolved administrations in the UK may see this as an opportunity to chart separate pathways with the glue of EU environmental law no longer binding. Whether this will generate new learning or deep fragmentation remains to be seen but, having slipped the hand of Nurse, we should proceed with caution.

⁴³ A reference of course to Joseph Stiglitz, *Globalisation and its Discontents* (Norton 2002).